PP

v.

MOHD ABBAS DANUS BAKSAN

HIGH COURT MALAYA, JOHOR BAHRU
KP GENGADHARAN NAIR JC
[CRIMINAL TRIAL NO: MT(3)45-13-2004]
27 AUGUST 2004

CRIMINAL LAW: *Penal Code - Section 300 - Murder - Whether prima facie case established - Unsworn statement from dock by accused - Whether amounted to a mere denial - Whether ingredients of murder established - Whether there was a reasonable doubt cast on prosecution's case*

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Whether established - Behaviour and conduct of accused - Cumulative effect of circumstantial evidence*

CRIMINAL PROCEDURE: *Accused - Unsworn statement from dock - Whether there was sufficient proof to inject reasonable doubt into prosecution's case - Whether end result of statement just a mere denial*

The accused was charged with the murder of a ten-year old child ('the deceased') under s. 300 of the Penal Code ('the Code'). The deceased had been sent on an errand and would have had to pass a Tenaga Nasional Berhad Substation ('Pencawang TNB') on the way to the shop. When the deceased did not return, a search ensued which led the searchers to the accused, a security guard on duty at the Pencawang TNB. He refused to let them in and, later, even refused to let the police in despite permission being obtained from the accused's employer. One policeman and some of the searchers climbed the gate, disarmed the accused – who was holding on to a large parang – and handed him over to another policeman outside the guardhouse. They found the deceased in the toilet; the deceased was certified as dead upon reaching the health clinic.

There was the evidence of the chemist that the accused's seminal stains were found on the trousers worn by the deceased; furthermore, the accused's seminal stains and a drop of the deceased's blood were also found on the blanket seized from the toilet upon discovery of the deceased's body. The evidence also pointed to the accused being alone in the compound of Pencawang TNB and in the guardhouse on the date of the murder until the others entered the compound. At the close of the prosecution's case, the defence submitted that the

prosecution's case was based purely on circumstantial evidence arguing that, in essence, the prosecution had only proven that the accused was at the scene where the deceased was found and that traces of the accused's seminal fluid were on the deceased's trousers and on some other exhibits seized from the guardhouse. The defence contended that this was insufficient to establish a *prima facie* case against the accused. The accused also opted to make an unsworn statement from the dock denying that he had killed the deceased, and instead accused one Suyaimi, who was also employed as a security guard in the accused's workplace, and an unknown person named Jojo, of raping and killing the deceased.

Held:

[1] On the facts, the circumstances constituted a *prima facie* case against the accused that warranted the calling of the accused's defence to answer the charge against him. The behaviour and conduct of the accused was not consistent with that of a person who had nothing to hide. Although there were no witnesses and the evidence against the accused was circumstantial in nature, the cumulative effect of all the evidence led to the irresistible conclusion that it was the accused that had committed the crime. (p 263 c-d)

[2] It was quite clear that the accused was merely trying to tailor his defence in an attempt to create doubts about the prosecution's case knowing full well, having opted to give his evidence in the form of an unsworn statement from the dock, that his story could not be tested by cross-examination. The end result of his statement was just a mere denial and such denial without other proof to reasonably dislodge the evidence presented by the prosecution was insufficient to inject reasonable doubt into the prosecution's case. Also, there was no evidence that Suyaimi and Jojo were present in the guardhouse on the date of the murder before the body of the deceased was found. (pp 266 f & 267 g-h)

[3] The prosecution's case had established the ingredients of an offence under s. 300 of the Code in that: (a) the deceased had died; (b) such death had been caused by, or in consequence of, the act of the accused (*ie*, manual strangulation); and (c) such act was done by the accused with the intention of causing death; or the act was sufficient in the ordinary course of nature to cause death; or the accused caused death by doing an act known to him to be imminently dangerous that it must in all probability cause death. In this instance, the accused had strangled the deceased with his hand by pressing on her neck knowing that this pressure to the neck could lead to her death. (pp 268 h & 269 a-b)

[4] The accused had failed to cast a reasonable doubt on the prosecution's case in respect of the charge against him; thus, he was found guilty of murdering the deceased on the date, between the times and at the place mentioned in the charge. (p 269 e-f)

[Accused convicted and sentenced to death.]

Case(s) referred to:
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Jayaraman & Ors v. PP [1982] 2 MLJ 306 ***(refd)***
Liew Kaling & Ors v. PP [1960] 26 MLJ 306 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Masroni Ahmad Rafi v. PP [1996] MLJ 584 ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Mohamed Salleh v. PP [1969] 1 MLJ 104 ***(refd)***
Ng Hoi Cheu & Anor v. PP [1968] 1 MLJ 53 ***(refd)***
PP v. Ling Tee Huah [1982] 2 MLJ 324 ***(refd)***
PP v. Saiman & Ors [1971] 2 MLJ 16 ***(refd)***
Sunny Ang v. PP [1966] 2 MLJ 195 ***(refd)***
Virsa Singh v. State of Punjab AIR [1958] SC 465 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180, 277
Penal Code, s. 300

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, 24th edn, p 1442

For the accused - Haniff Hassan; M/s Haniff Hassan & Co
For the prosecution - Abdul Rashid Sudin (Mohd Nordin Ismail) DPP
Watching brief for deceased's family - Mohamed Harmy Yusoff; M/s Soo Thien Ming & Nashrah
Watching brief for deceased's family - Mohamed Zaini Hj Mazlan; M/s Gideon Tan Razali Zaini
Watching brief for Tenaga Nasional Bhd - Lalitha Nagamuthu (Azlena Maria Abu Bakar); M/s Shafee & Co

Reported by Suresh Nathan

JUDGMENT

KP Gengadharan Nair JC:
The charge against the accused is as follows:

> Bahawa kamu pada 17.1.2004 jam diantara 9.20 pagi hingga 1.00 petang, di Pondok Pengawal Pencawang Masuk Utama TNB, Kampung Pekajang, Tanjung Kupang, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah melakukan kesalahan membunuh dengan menyebabkan kematian

seorang perempuan Melayu bernama NURUL HUDA BINTI GANI, NO. SURAT BERANAK: K362108, Berumur 10 tahun. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

The Prosecution's Case And The Facts

In the morning of 17 January 2004 at about 8.50am in Kg. Pekajang, Tanjung Kupang, Gelang Patah, Johor, a young girl aged ten by the name of Nurul Huda bte Gani, (hereinafter referred to as "the deceased") was sent by her elder sister, Aien (PW10), on an errand to the neighbourhood provision shop known as 'Wak Midek' to buy some fish, lemon grass (serai) and eggs. The deceased who was wearing a white T-shirt with pink sleeves and blue trousers went to the shop on her blue coloured bicycle.

The deceased would have had to pass a Tenaga Nasional Berhad Substation (Pencawang TNB) on the way to the shop and back as the Pencawang TNB is located about 300 meters from the deceased's house and about 250 meters from the shop.

When the deceased did not return after about twenty minutes PW10 was worried and asked a boy to go to the shop to find out about the deceased. The boy went to the shop and returned to inform her that the shopkeeper had told him that the deceased had come but had left the shop. PW10 went to her cousin's house and asked her cousin (Jamaliah) to accompany her to look for the deceased. Both of them then went on a motorcycle looking for the deceased. They went to Wak Midek's shop and the lady (PW13) in the shop told them that deceased had come and gone home. At about 9.30am PW10 and her cousin went home and asked PW10's sister, Norashikin, to join them in the search for the deceased.

At about 11.09 am PW10 called her brother, Ameer (PW11), and together they began to search for the deceased in a borrowed Proton Wira car. They felt that the deceased must be somewhere between the shop and their house. In between the shop and the house is the Pencawang TNB. When they were passing the Pencawang TNB PW10 saw the accused dressed in a security guard's uniform sitting in front of the guard house inside the Pencawang TNB. They stopped in front of the main gate and enquired from the accused whether he had seen the deceased after describing the deceased and the fact that she was riding a blue bicycle. The accused told them that he had not seen the deceased.

Ameer (PW11) requested the accused to permit them to enter Pencawang TNB to look for the deceased but he refused to let them in. Thus, they continued to look for the deceased outside the Pencawang TNB whilst calling out the deceased's name. Meanwhile, Norashikin told her cousin to go home and ask her other brother, Aziz (PW12), to come to the Pencawang TNB to join them in the search for the deceased.

They then, once again, asked the accused for permission to enter the Pencawang TNB but again he refused saying that only the employer or policemen can enter the compound. When Aziz (PW12) arrived he was asked to remain in front of the main gate of Pencawang TNB to keep an eye on the accused. Jamaliah was asked to go to the deceased's mother's shop in Bukit Kuching to find out whether the deceased was there. In the meantime PW10 and PW11 went to the police station at the Second Link in Gelang Patah commonly referred to as "Balai Polls CIQ" by the locals.

At the police station they secured the assistance of police Corporal Peter Andrew Fletcher (PW9) and L/Cpl Rusli bin Alias (PW17) who agreed to accompany them to Pencawang TNB.

PW10 and PW11 returned to Pencawang TNB together with the two policemen, PW9 and PW17, at about 1pm and PW9 asked the accused to let him in. Although PW9 was in full police uniform the accused still refused to let him into the Pencawang TNB.

The accused told PW9 to obtain permission from the accused's employer by the name of Mohamad bin Saad. Permission was then obtained from Mohamad bin Saad over the mobile phone and despite the accused being instructed to permit entry, the accused still denied PW9 entry.

After some exchange of words between PW9 and the accused, PW9 climbed over the gate (about 11ft in height) followed by PW11, PW12 and PW17. By then a group of people from the village had gathered in front of the Pencawang TNB.

After climbing over the gate PW9 rushed into the guard house whilst PW11 and PW12 looked for the deceased around the area outside the guard house. PW9 went into the guard house and caught hold of the accused who was, by then, holding on to a long parang and disarmed him before handing him over to PW17 outside the guard house. After that PW9 went back into the guard house and upon opening the sliding door of the toilet inside the guard house he saw the deceased on the floor inside the toilet in a squatting position with both her elbows on her knees and her hands on her cheeks. He shouted out "Saya sudah jumpa budak".

Upon hearing this, PW11 rushed into the toilet in the guard house and he saw the deceased naked in the toilet with a towel stuck in her mouth. She appeared to be unconscious. PW11 carried the deceased and placed her on a wooden platform in the guard house. He then put the deceased's T-Shirt on her and carried her out of the guard house to the entrance of Pencawang TNB where he requested a passing van to take them to the Health Clinic in Gelang Patah.

At the clinic Encik Mohd Jamil bin Abadi (PW15), a Medical Assistant, certified that the deceased was dead. The deceased's body was then taken to the Tanjung Kupang Police Station in an ambulance together with the members of the deceased's family.

At the police station the body of the deceased was identified to the Investigating Officer (PW26 – ASP Idris bin Abd. Karim) before the body was sent to Hospital Sultanah Aminah, Johor Bahru for a post-mortem. The Investigating Officer and some other police officers went to Pencawang TNB to carry out investigations, in the course of which several exhibits were seized from the guard house and outside it. PW26 then returned to Balai Polis Tanjung Kupang where he was informed that two suspects had been arrested. They were the accused and one Suyaimi bin Mohd Zain (PW23). PW26 took the accused and PW23 to Ibu Pejabat Polis Daerah Johor Bahru Utara. He then contacted Dr Shahidan bin Md Noor (PW1) to fix the time and date for the post-mortem.

The post-mortem was conducted at about 8pm by Dr Shahidan bin Md Noor (PW1) after the body of the deceased was identified to him by PW26.

PW26 also instructed L/Cpl Samy (PW6) to take photographs of the post-mortem but the photographs did not materialize due to a fault in the camera.

During the post-mortem several samples of specimens from the deceased's body were taken and handed over to PW26 for onward transmission to the chemist for analysis. PW26 also received the clothes worn by the deceased.

At about 6.30pm on 17 January 2004 the clothes then being worn by the accused and Suyaimi (PW23) were seized for the purposes of being sent to the chemist for analysis.

On 19 January 2004 finger nail clippings and samples of blood were taken from the accused and Suyaimi (PW23) for the purposes of being sent to the chemistry department.

About 29 items pertaining to the case seized by the police together with the blood and nail samples of both the accused and Suyaimi bin Mohd Zain (PW23) were sent to the Chemistry Department in Petaling Jaya, Selangor on 20/1/04 for Deoxyribonucleic acid (DNA) tests. The chemist, Encik Bakhtiar

bin Kassim (PW4), after carrying out the DNA tests confirmed, *inter alia*, that the sperm of the accused was present on the trousers worn by the deceased on 17 January 2004 and which trousers was recovered from the guard house of Pencawang TNB on 17 January 2004. The chemist also found the accused's sperm on the towel, bedsheet and blanket seized on 17 January 2004 after the deceased's body was found in the toilet of the guard house of Pencawang TNB. Further, the accused's sperm was also found on his shorts seized from him on 17 January 2004.

The chemist, after analyzing all the exhibits sent to him, concluded *vide* exh. P16 the profile to be thus:

(i) Profail DNA yang diperolehi daripada kesan air mani pada seluar pendek "E1", kesan air mani pada cadar "E2", kesan air mani pada selimut "E2A", kesan air mani pada tuala "E11", kesan air mani pada seluar panjang "E12", rambut "E4A", keratan kuku "G3", kesan darah pada baju-T "HI", kesan darah pada baju kemeja "H2" dan kesan darah pada seluar panjang "H4" berpadanan (match) di antara satu sama lain dan berpadanan dengan profil DNA spesimen darah "G2" (berlabel 'Mohd Abas bin Danu Bahsan'). Ini menunjukkan bahawa DNA yang dikenalpasti berasal daripada sumber yang sama. Probabliti seorang (yang dipilih secara rambang dan tidak mempunyai kaitan kekeluargaan) mempunyai profil DNA yang sama dengan profil DNA tersebut adalah 1 dalam 4.7 sextillion (4.7×10^{21}) dikira berdasarkan kepada pengkalan data STR penduduk Malaysia berbangsa Melayu.

(ii) Profail DNA yang diperolehi daripada kesan darah pada selimut "E2A" dan keratan kuku "F3" berpadanan (match) diantara satu sama lain dan berpadanan dengan profil DNA spesimen darah "F2" (berlabel 'Nurul Huda bte Gani'). Ini menunjukkan bahawa DNA yang dikenalpasti berasal daripada sumber yang sama. Probabliti seorang (yang dipilih secara rambang dan tidak mempunyai kaitan kekeluargaan) mempunyai profil DNA yang sama dengan profil DNA tersebut adalah 1 dalam 54 quitillion (54×10^{18}) dikira berdasarkan kepada pengkalan data STR penduduk Malaysia berbangsa Melayu.

(iii) Profail DNA separa (partial DNA profile) yang diperolehi daripada kesan air mani "E8[c]", kesan air mani pada tikar "E9" dan kesan darah pada singlet "J1" (masing-masing sembilan, lima dan tujuh lokus genetic) didapati konsisten dengan profil DNA spesimen darah "G2" (berlabel 'Mohd Abas bin Danu Bahsan').

(iv) Profail DNA separa (partial DNA profile) yang diperolehi darpada keratan kuku "G4" (sepuluh lokus genetic) dan didapati konsisten dengan profil DNA spesimen darah 'G1" (berlabel 'Suyaimi bin Mohd Zain').

(v) Profail DNA separa (partial DNA profile) seorang lelaki telah diperolehi daripada kesan air mani "E8[b]" didapati berbeza dengan profil DNA spesimen darah "G1" (berlabel 'Suyaimi bin Mohd Zain') dan specimen darah "G2" (berlabel 'Mohd Abas bin Danu Bahsan'). Ini menunjukkan bahawa DNA yang dikenalpasti berasal daripada sumber yang berlainan.

For the prosecution to succeed in proving a charge under s. 300 of the Penal Code it has to prove the following three elements:

1) That the death of a human being has actually taken place;

2) That such death has been caused by, or in consequence of, the act of the accused;

3) That such act was done with the intention of causing death; or it was done with the intention of causing such bodily injury as:

(a) the accused knew to be likely to cause death; or

(b) was sufficient in the ordinary course of nature to cause death; or the accused caused death by doing an act known to him to be so imminently dangerous that it must in all probability cause:

(a) death, or

(b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

(See *Ratanlal & Dhirajlal's Law of Crimes*, 24th edn at p. 1442).

There is no dispute in this case that the deceased in this case, Nurul Huda binti Gani, aged 10 had died on 17 January 2004 as a result of manual strangulation. The deceased's brother, sister and father had identified her to the investigating officer, ASP Idris bin Abd. Karim (PW26), who in turn identified her to the forensic pathologist, Dr Shahidan bin Md Noor (PW1), before he conducted the post-mortem examination at about 8pm on 17 January 2004.

The post-mortem report is as follows:

POST MORTEM EXAMINATION REPORT
ON NURUL HUDA BINTI GANI

Acting on a request of 'Polis DiRaja Malaysia (in relation to Tg. Kupang Police Report No, 0021/2004), I, the undersigned at 8.00 pm on 17th January 2004 (Saturday) within the mortuary of Hospital Sultanah Aminah in Johor Bahru made a post mortem examination and dissection on Nurul Huda binti Gani.

Birth Certificate No. K 362108

Age: 10 YEARS

Sex: FEMALE

Race: MALAY

Address: 55, Kg. Pekajang, GelangPatah

Date and time when brought in: 17th January 2004/5.00pm.

The body was identified by:

a) Police: ASP Idris bin Abd. Karim G/12164

EXTERNAL EXAMINATION

The body was that of a 10-year-old Malay girl 125cm long (height) and of medium build with thin and slim disposition weighed approximately 40kg. She had long black hair (42cm) and luxuriant. She was clad in a white short-sleeved t-shirt its sleeves pink and its front printed a female with an umbrella. Her face was congested with minimal showers of petechiae especially marked on the right side. Subconjunctival haemorrhages were evident. The fingertips were cyanosed.

Several marks of trauma were evidence namely:

1) Bruise 4 x 1.5cm on upper left chest about midclavicle;
2) Vague linear abrasions 2cm, 2cm and 1cm over the thyroid prominence;
3) Bruise 1 x 0.5cm over the ramus of left mandible;
4) Area of redness below the left ear;
5) Bruise 2 x 1cm over the angle of right mandible, and
6) Three abrasions each 0.5 cm in diameter on outer right ankle.

The vagina showed reddening about its opening with hymen torn and colourless fluid oozed from within. The skin between the vagina and the anus was also torn 3 x 2cm. The anus showed tear around it edges.

Rigor mortis was fully established and darkish hypotasis present on the back.

INTERNAL EXAMINATION

Head

The scalp was intact and uninjured when reflected in the usual manner. The skull 3-5mm thick was also intact. The meninges were unremarkable. The brain (1,275g) was unremarkable when both examined grossly and serially sectioned.

a The vessels on the base of the brain were patent and intact.

Mouth, throat and neck structure

There were areas of soft tissue bleeding on the lower pole of right thyroid gland and on the thyroid cartilage about the bases of greater horns. Minimal
b soft tissue bleeding also noted about the front of the thyroid prominence. Both the hyoid bone and the thyroid cartilage however were intact and uninjured.

Chest

The chest wall together with its ribcage were intact. The on pleural cavity each side was clear and dry. The oesophagus was intact and unremarkable.
c The trachea and its air passages contained copious bloody froths. The lungs were congested (right 180g, left I72g). Some petecthiae present on front surface of the pericardial sac which was otherwise intact and free from excess effusion. The heart (118g) was appropriate size and configuration and unremarkable in all other aspects.

d **Abdomen**

The abdominal wall was intact and its cavity was clean. The stomach contained substantial chymes or partially digested foodstuffs. The liver (820g) and all other organs such as kidneys, pancreas, the intestines and adrenal glands were intact and unremarkable and still warm.

e

The uterus was of usual infantile size and the ovaries unremarkable when examined in situ.

Skeleton

f No bony injury seen or detected.

OTHER INVESTIGATIONS

Samples of blood, nail clippings and head hair each were submitted for analysis.

g Swab from the vagina and the anus were also submitted.

CONCLUSIONS

I was informed that this Malay girl went to buy groceries by cycling not very far from her home in Kg. Pekajang, Gelang Patah morning 17th January 2004.
h When she never returned the family tried to search her. Her lifeless body was found in a guard room of the TNB substation nearby a few hours later.

i

At post mortem examination showed minimal surface marks of trauma along with congestion of the face, petechiae and cynosis. Internally there were soft tissue bleedings in the neck structures along with copious froths in the airways. The vagina and the anus were also injured with signs suggestive of entry by blunt object(s). In view of these findings along with the circumstances, I formulated the cause of death as due to manual strangulation.

CAUSE OF DEATH

1(a) Manual strangulation.

'Attested on soul and conscience'

sgn

DR SHAHIDAN BIN MD. NOOR A.M.N.
Pakar Perunding Patologi (Forensik)
Jabatan Pathologi
Hospital Sultanah Aminah
Johor Bahru.

The pathologist was of the considered view that the injuries to the neck of the deceased was caused by a single hand of one person. He also testified that in his view the minimal marks of trauma indicated by the lack of defensive injuries on the body of the deceased that the deceased had been silenced first before she was sexually attacked.

The deceased's body was found in the toilet of the guard house of Pencawang TNB at about 1.20pm. The evidence adduced through several witnesses shows that the accused was alone in the guard house between the time the deceased disappeared and up to the time her body was discovered in the guard house together with her bicycle.

The learned defence counsel in cross examination of some witnesses made an attempt to suggest that Suyaimi bin Mohd Zin (PW23) was the person guilty of murdering the deceased on that day in the guard house. It was expressly put to PW23 himself that he had met the deceased at about 9am on 17 January 2004 near the Pencawang TNB and brought her to the guard house of Pencawang TNB together with her bicycle and his yellow coloured bicycle after which he raped her in the guard house between 9am and 1pm before strangling her to death. It was further put to PW23 that after he had killed the deceased he hid her bicycle inside the guard house and that he then went home on his yellow bicycle.

Learned counsel for the accused also suggested to PW23 that he had attempted to run away when the police officers came to his house on 17 January 2004 after they had found the body of the deceased because he was guilty of having killed the deceased in the guard house that day. PW23 denied all the allegations and maintained that he was in his house on that day until the police came to his house and explained that he tried to flee when the police officers came to his house as was he was a drug addict. PW23's mother (PW22) in her evidence, confirmed that her son (PW23) was at home on 17 January 2004 until he woke up late that day and that both he and the yellow bicycle were at home that day. Although there were some discrepancies between the evidence of the mother and son in respect of the time PW23 woke up and whether he had breakfast alone or with PW22, the evidence that PW23 and his yellow bicycle were at home on that day during the material period remains unshaken in cross examination.

As I stated earlier, in the cross examination of PW23 it was put to him that after the murder of the deceased on 17 January 2004 he had gone home on his yellow bicycle. However, a yellow bicycle was still in the Pencawang TNB's compound when PW26 went here at about 3.45pm on that day. There is no evidence that this bicycle belonged to PW23.

There is the evidence of the chemist that the accused's seminal stains were found on the trousers worn by the deceased that morning. Further the accused's seminal stains and a drop of the deceased's blood were also found on the blanket (selimut) seized from the toilet of the guard house upon the discovery of the deceased's body.

The Investigation Officer (PW26) confirmed in his testimony that he inspected the fencing surround the Pencawang TNB on 17 January 2004 and found that the fence was intact thus leaving the main gate near the guard house as the only entrance into the compound. The evidence points to the accused being alone in the compound of Pencawang TNB and in the guard house on 17 January 2004 until the policemen and others entered the compound.

Further, the conduct of the accused denying to PW10 & PW11 that he had seen the deceased, refusing them permission to enter and search and refusing even PW9, the police officer (in uniform), permission to enter the compound of Pencawang TNB despite having been instructed by his superior to let the police in gives rise to a logical inference that the accused was trying to conceal something within the guard house and/or compound of Pencawang TNB. That something was the body of the deceased in the toilet of the guard house.

The prosecution closed its case after calling twenty six witnesses. At that stage of the proceedings s. 180 of the Criminal Procedure Code required me to decide whether the prosecution had made out a *prima facie* case against the accused. To do this I had to subject the evidence adduced to a maximum and thorough evaluation whilst bearing in mind that it was not incumbent upon the prosecution to prove its case beyond reasonable doubt at that stage of the proceedings.

In *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 Gopal Sri Ram JCA stated as follows:

> It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to **maximum evaluation** and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution's case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

His Lordship went on in the judgment to add as follows:

> In our judgement, ... But, we would emphasise and make it amply clear that there is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. Whether it has done so, is a question that must be dealt with at the close of the whole case.

Submission By Defence At Close Of Prosecution's Case

At the close of the prosecution's case the defence submitted that the prosecution had not made out a *prima facie* case and, consequently, urged the court to acquit and discharge the accused of the charge. The defence contended that the prosecution's case was based purely on circumstantial evidence arguing that, in essence, the prosecution had only proven that the accused was at the scene where the deceased was found and that traces of the accused's seminal fluid were on the deceased's trousers and on some other exhibits seized from the guard house and submitted that this was insufficient to establish a *prima facie* case against the accused. Learned counsel referred to the case of *Chang Kim Siong v. PP* [1968] 1 MLJ 36 and *Jayaraman & Ors v. PP* [1982] 2 MLJ 306 both of which are authorities for the proposition that when the prosecution relies on circumstantial evidence the onus on it is a very heavy one as the evidence must point irresistibly to the conclusion of the guilt of the accused. It was also the defence's submission that the prosecution had failed to prove that only the accused was at the guard house before the deceased was found there and that the prosecution did not prove that only the accused had access to the TNB's substation and the guard house, in particular. The defence contended that the fact that the accused's seminal fluid was found on his shorts

and on some other items such as a towel and straw mat was not sufficient to infer that the accused murdered the deceased stating that there was also some trace of semen of an unknown person in one of the two straw mats (PI3) seized by the police from just outside the guard house. A further point advanced was that Suyaimi's (PW23) denial of his involvement in the death of the deceased in cross examination is doubtful because of the discrepancies in the evidence by him and by his mother in respect of the time PW23 woke up and whether he had breakfast alone or with his mother. The defence submitted that because of these discrepancies the prosecution ought to have called PW23's father and sister to close the gap. A further point raised was that the prosecution did not provide any explanation as to why PW23 was arrested immediately after the accused's arrest in connection with the death of the deceased on 17 January 2004.

Prima Facie Case

To determine whether the prosecution had made out a *prima facie* case I also took into consideration the following after evaluating the evidence that came out in the examination in chief and in cross examination during the case for the prosecution namely:

(1) The accused was alone in the guard house of the Pencawang TNB on the morning of 17 January 2004 until the discovery of the naked body of the deceased together with her bicycle in the toilet of the guard house.

(2) When the brother (PW11) and sister of the deceased went to the guard house during their search for the deceased in the morning of 17 January 2004 and enquired from the accused whether he had seen the deceased that morning he denied having seen her.

(3) When the brother (PW11) and sister (PW10) of the deceased asked the accused to let them into the Pencawang TNB to look for the deceased the accused refused.

(4) When the two police officers (PW9 and PW17) together with the deceased's brother and sister arrived at the gate to the Pencawang TNB and requested the accused to be let into the Pencawang TNB he still refused them entry even though PW9 was in police uniform and the accused's employer/ superior had instructed him to let him in.

(5) When the police officer finally climbed over the gate of Pencawang TNB and approached the guard house the accused went into the guard house and held on to a long parang until he was disarmed physically by the police officer.

(6) The evidence of the chemist (PW4) who conducted DNA tests on the exhibits seized from the guard house and from the accused after the discovery of the deceased that he found the accused's seminal fluid on the shorts found in the guard house and on the trousers worn by the deceased. The accused's seminal fluid was also on the blanket (selimut), bedsheet and towel seized from the guard house. Further, the blanket had a drop of the deceased's blood on it.

(7) The evidence of the pathologist, Dr Shahidan bin Md. Noor (PW1), who confirmed that the deceased died as a result of manual strangulation and that the deceased had been sexually assaulted.

I was of the considered view that the matters that I have referred to earlier, taken collectively, in the circumstances constituted a *prima facie* case against the accused that warranted the calling of the accused's defence to answer the charge against him. The behaviour and conduct of the accused was not, to my mind, consistent with that of a person who had had nothing to hide. Thus, I called for the accused's defence after I had reminded myself, and was mindful that there are no eye witnesses and in that sense the evidence against the accused is circumstantial evidence. In my view the cumulative effect of all the evidence led to the irresistible conclusion that it was the accused who committed the crime. (See *Sunny Ang v. Public Prosecutor* [1966] 2 MLJ 195).

Unsworn Statement

After the three options available to an accused person in such circumstances were explained to the accused both in Bahasa Malaysia and in Tamil the accused opted to make an unsworn statement from the dock. The statement, at the accused's request, was in type written form in Bahasa Malaysia. The statement was read and explained to the accused by the court's interpreter both in Bahasa Malaysia and in Tamil and upon the accused confirming the same together with an addition to it by him, orally, that Suyaimi (PW23) was also employed as a security guard in Pencawang TNB. With this addition the accused signed the statement and it was then marked as exh. D24.

For completeness I set out below the entire statement which is as follows:

> Nama saya Mohd Abas bin Danus Baksan. Saya berasal daripada Bidor, Perak. Saya sebelum ini bekerja di Gemilang Security sebagai Pengawal Keselamatan di Pencawang TNB, Kg. Pekajang, Tg. Kupang daripada 13/10/2003 hingga 17/1/2004.
>
> Dalam jam lebih kurang pukul 9.00 pagi 17/1/2004, semasa saya berada di bahagian luar pagar Pencawang TNB, Ngengel bawa basikal kuning jenis ada gear bersama seorang budak perempuan yang naik basikal biru. Kemudian dia bawa budak perempuan itu masuk ke dalam kawasan Pencawang TNB itu.

Ngengel telah membawa budak perempuan itu masuk ke dalam pondok pengawal keselamatan yang ada di situ. Saya masuk ke dalam pondok itu. Saya tanya dia siapa budak perempuan itu. Jawab Ngengel, dia adalah anak saudaranya. Selepas itu dia bagitau saya yang kawannya seorang lagi yang bernama Jojo akan datang dari Kg. Tiram Duku.

Saya kemudiannya keluar semula ke bahagian luar pagar kawasan itu. Dalam pukul 9.10 minit pagi hari yang sama, Jojo datang bawa motor RXZ warna hitam no. pendaftaran saya tak ingat. Dia datang seorang sahaja. Apabila Jojo sampai, dia masuk ke dalam kawasan Pencawang TNB dan saya pun ikut masuk, kunci pintu pagar dan terus masuk dalam pondok bersama Jojo. Masa itu saya nampak Ngengel baring di atas budak perempuan itu di atas pangkin papan yang ada di dalam pondok tersebut. Dia tak pakai seluar dan baju. Dua tangannya saya nampak sedang mencekik leher budak perempuan itu sambil main. Maksud saya main ialah dia merogol budak itu. Kejadian itu berlaku lebih kurang 5 minit. Masa Ngengel main, budak itu juga tidak berpakaian. Budak itu dalam keadan berbaring dan tidak bersuara. Selepas itu, Ngengel bangun dan mengambil basikal biru kepunyaan budak perempuan itu dan meletakkannya di dalam bilik air yang berada di dalam pondok berkenaan.

Kemudian saya cuba main budak itu tetapi budak itu tak bergerak. Saya tak pasti samada kemaluan saya masuk ke dalam kemaluannya atau tidak sebab keadaannya budak perempuan itu tidak bergerak dan bersuara. Saya cuma mengesel-gesel kemaluan saya sehingga air mani saya terpancut. Masa itu saya memegang bahu kiri budak perempuan itu dengan tangan kanan saya. Kemudian saya bangun dan saya nampak Jojo pula baring di atas budak perempuan itu. Jojo pakai baju tanpa seluar. Saya nampak Jojo pun meletakkan tangannya di bahagian leher budak itu. Masa itu saya berada di dalam pondok itu.

Lebih kurang jam 9.20 minit, Jojo bangun, Ngengel kemudiannya dukung budak itu dan meletakkannya di dalam bilik air dalam keadaan mencangkung. Kemudian dia tutup pintu bilik air, selepas itu dia pun keluar bersama Jojo naik motosikal RXZ Jojo. Ngengel bagi tau yang sekejap lagi dia akan datang semula. Selepas dia keluar, sayapun kunci pintu pagar. Saya terus masuk dalam pondok, duduk atas kerusi merah. Lebih kurang 5 minit kemudian, ada sebuah kereta Proton Wira warna putih datang dan seorang lelaki dan 2 orang perempuan panggil saya. Saya pun pergi depan pintu pagar. Saya pun tanya dia sebab apa. Dia bagi tahu saya, dia nak masuk sekejap dalam pondok pengawal. Saya tak bagi dia masuk dalam kawasan itu. Saya kata kalau nak masuk, bawa polis. Dia cakap dia nak masuk sekejap sahaja tetapi saya kata tak boleh.

Mereka kemudiannya beredar. Lepas itu, kawan saya nama Among datang jumpa saya, dia bawa saya pergi Tiram Duku tempat Jojo dan saya beli heroin satu tiub harga RM20. Saya ada jumpa Jojo di situ dan saya tanya mana Ngengel. Jojo kata dia dah balik ke rumahnya. Saya pun balik ke kawasan pencawang TNB semula naik motor dengan Among. Saya masuk ke dalam kawasan TNB, kunci pintu pagar lepas tu kereta putih itu datang lagi lebih kurang dalam pukul 1 tengahari bersama seorang polis beruniform dan seorang lagi tidak. Lelaki yang bawa kereta putih itu pun ada sama. Mereka nak masuk saya tak bagi sebab orang kampong ramai. Saya kemudiannya bagi no. telefon pengurus saya iaitu Mohamad Saad. Polis ada telefon kemudiannya dia bagi telefon itu kepada saya. Mohamad Saad bagi masuk. Saya tak buka pintu pagar kerana orang kampong sudah ramai. Saya terus masuk dalam pondok, duduk atas kerusi plastik merah. Saya nampak lelaki yang bawa kereta putih itu panjat pagar bersama polis. Orang lain juga ada panjat sama. Kemudian polis itu masuk dalam pondok, dia buka bilik air, orang kampong pun sudah masuk dalam. Dia tanya dalam bilik air itu ada apa. Terus orang kampong pukul saya dan ada seorang polis tolong saya. Saya ada bagi tau yang ada seorang lagi nama Ngengel ada terlibat dan ada bersama saya pagi itu. Tak lama kemudian, saya nampak ada sebuah kereta datang ke kawasan pencawang TNB itu kemudian ada polis tanya adakah lelaki yang telah ditangkap berada dalam kereta itu namanya Ngengel. Saya kata Ya. Kemudian polis tanya lagi ada siapa lagi, saya cakap lagi seorang nama Jojo. Saya kemudiannya dibawa oleh polis ke Tiram Duku tanya sama orang kampong mana Jojo yang ada di situ sebentar tadi. Orang-orang di sana bagi tahu yang dia telah melarikan diri bila nampak polis. Polis tanya mana rumah dia kemudian orang kampong tunjuk rumah dia. Dalam rumah itu dia sudah tiada dan ditingalkan kosong. Saya dan Ngengel kemudiannya di bawa ke Balai Polis Tanjung Kupang dan masuk lokap. Lepas itu saya masuk lokap Balai Polis Skudai.

Saya tidak bunuh budak perempuan itu. Saya tak ada niat nak bunuh dia. Orang lain yang bunuh tak kan saya nak tanggung.

Itu sahaja kenyataan saya.

To the above must be added a sentence to the effect that Ngengel (PW23) was also employed as a security guard at Pencawang TNB, Kampong Pekajang, Tanjung Kupang, Gelang Patah, Johor.

Case For The Defence

Throughout the prosecution's case the defence took the position that it was Suyaimi (PW23) who had raped and killed the deceased on 17 January 2004. Then in the statement (D24) of the accused, the accused again points the finger at PW23 and also one other person by the name of "Jojo" who, according to the accused, was a friend of PW23. However this allegation of Jojo being involved in the rape and death of the deceased or of him being PW23's friend was never put to PW23 by the defence when he gave his evidence.

In an attempt to connect PW23 to the death of the deceased and to show that he was present at the guard house on 17 January 2004, the defence made much of a yellow bicycle found outside the guard house but within the compound of Pencawang TNB on 17 January 2004 by the Investigating Officer (PW26) when he went there in the course of his investigation into the death of the deceased implying that that yellow bicycle was actually PW23's bicycle as he too had a yellow bicycle. However, when PW23 was cross examined the learned defence counsel had, infact, put to him that after PW23 had killed the deceased he had gone back home on his yellow coloured bicycle thereby negating any link between the yellow bicycle found in the Pencawang TNB's premises on 17 January 2004 when the Investigating Officer (PW26) went there on the said day and PW23 and his yellow coloured bicycle.

Even though the accused's statement (D24) is an unsworn statement from the dock it, nevertheless, must be given due consideration by me. (see *Mohamed Salleh v. Public Prosecutor* [1969] 1 MLJ 104; *Ng Hoi Cheu & Anor v. Public Prosecutor* [1968] 1 MLJ 53).

However, the weight to be attached to the contents of an unsworn statement would be less than that for sworn evidence from the witness's box tested by cross examination. (See *Mohamad Salleh v. PP, supra*; *Masroni bin Ahmad Rafi v. Public Prosecutor* [1996] MLJ 584).

In the accused's statement he denies that he killed the deceased and tries to deflect the charge by shifting the act of murder on to PW23 or that unknown person who the accused names as "Jojo". However, there is no evidence that PW23 or Jojo were present in the guard house on 17 January 2004 before the body of the deceased was found. Infact, when PW23 was cross examined by the learned defence counsel the issue of Jojo being PW23's friend or of Jojo alleged presence on 17 January 2004 in the guard house together with PW23 were not raised at all.

Further, the accused added on to his statement by stating that PW23 was also employed as a security guard at the Pencawang TNB at the material time. This was another subtle attempt by the accused to shift the blame for the death of the deceased on to PW23 when, infact, the question of whether PW23 was employed at the Pencawang TNB was not at all put to PW23 when he was cross examined. It was also not put to PW26, the investigating officer, at all. Thus, there is no basis for the accused to state that PW23 was also employed at the Pencawang TNB. This is an afterthought.

The accused goes further in his statement to state that after PW23 and Jojo had sexually attacked the deceased PW23 left the Pencawang TNB on Jojo's motorcycle. This was also not put to PW23 in the course of his cross examination. On the contrary, learned defence counsel had put to PW23 that after he had killed and sexually attacked the deceased he had, infact, left the Pencawang TNB to go home on his (PW23's) yellow coloured bicycle.

The accused stated in his statement that he was taken to Tiram Duku after his arrest before being taken to the Tanjung Kupang police station whereas the evidence of the prosecution was that he was taken to Tg. Kupang police station after his arrest and there is no evidence about being taken to Tiram Duku. Be that as it may, this part of the accused's evidence from the dock was not even put to the prosecution's witnesses, particularly to the Investigating Officer (PW26).

Learned counsel for accused in his submission, argued that the existence of three persons (including accused) referred to in the accused's statement is not something which had been made up or an "afterthought defence". He referred to the committal proceedings of this case in the Magistrate's Court wherein the initial charge against the accused stated that the accused was charged together with two others who were still at large. Learned counsel argued that the charge in the Magistrate's Court must have been framed after a full and thorough investigation and, thus, that that the accused was not the only one alleged to be involved in respect of the crime is a "clear true fact". However, this aspect of the initial charge against the accused in the Magistrate's Court was not put to the Investigation Officer (PW26) at all in cross examination. The records of the committal proceedings and, in particular, the charge therein are not exhibits or evidence in this court. The defence ought to have adduced evidence or cross examined the relevant prosecution witness (eg, PW26) on this if it was going to be made an issue or be relied upon to support some contention.

Decision

It is, in my humble view, quite clear that the accused was merely trying to tailor his defence in an attempt to create doubts about the prosecution's case knowing full well, having opted to give his evidence in the form of an unsworn statement from the dock, that his story cannot be tested by cross examination. The end result of his statement is just a mere denial and assertions not supported by evidence. It is trite that mere denial without other proof to reasonably dislodge the evidence presented by the prosecution is insufficient to inject reasonable doubt into the prosecutions' case (see *PP v. Ling Tee Huah* [1982] 2 MLJ 324).

In *Public Prosecutor v. Saiman & Ors* [1971] 2 MLJ 16 Sharma J explained what "reasonable doubt" means as follows:

> The following definition of "reasonable doubt" is often quoted:
>
> > It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.
>
> It has again been said that "reasonable doubt" is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgement and finds a resting place there". Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

Denning J (as he then was) described in the case of *Miller v. Minister of Pensions* [1947] 2 All ER 372 his view of "reasonable doubt" and the degree of proof required in criminal cases as follows:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

(See also *Liew Kaling & Ors v. Public Prosecutor* [1960] 26 MLJ 306).

The prosecution's case has established the ingredients of offence under s. 300 of the Penal Code in that:

a) the deceased, Nurul Huda bte Gani, had died

b) such death had been caused by or in consequence of, the act of the accused (ie, manual strangulation);

c) such act was done by the accused with the intention of causing death; or the act was sufficient in the ordinary course of nature to cause death; or the accused caused death by doing an act known to him to be so imminently dangerous that it must in all probability cause death.

The accused strangled the deceased with his hand by pressing on her neck knowing that this pressure to the neck can lead to her death ie, by manual strangulation in this case. In *Virsa Singh v. State of Punjab* AIR [1958] SC 465 the Supreme Court of India in dealing with inference of intention from the injury expressed the following view:

> In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last details as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is simple and based on common sense the kind of inquiry that "twelve good men and true" could readily appreciate and understand.

Having carefully reconsidered the evidence adduced by the prosecution and the unsworn evidence given by the accused through his statement from the dock and for the reasons I have given I am satisfied that the accused has failed to cast a reasonable doubt on the prosecution's case in respect of the charge against him. I hearby find him guilty of having murdered Nurul Huda bte Gani (the deceased) on the date, between the times and at the place mentioned in the charge. Accordingly, I find him guilty as charged and convict him on the charge.

This is, indeed, a tragic case. The accused had snuffed out the life of a young innocent little girl just to satisfy his lust.

Sentence

The only sentence which I am allowed to pass in respect of the charge against the accused is the sentence of death. Accordingly, as required by s. 277 of the Criminal Procedure Code I direct that the accused be hanged by the neck till he is dead.